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No. 94-1244

In The

Supreme Court of the United States

October Term, 1995

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court held that in civil rights actions against individual government officials, orders denying dismissal and orders denying summary judgment on qualified immunity claims are both appealable final decisions under 28 U.S.C. § 1291. The Court of Appeals for the Ninth Circuit dismissed, for lack of jurisdiction, petitioner's appeal of a summary judgment order denying his qualified immunity claim, solely because petitioner had previously appealed the denial of a motion to dismiss on immunity grounds. The case therefore presents the following question:

Whether the court of appeals lacks jurisdiction over a government official's interlocutory appeal of a summary judgment order denying a claim of qualified immunity solely because the official had previously appealed a denial of immunity at the motion to dismiss stage.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a) is unreported. A prior and related opinion of the court of appeals in this case (Pet. App. 10a-33a) is reported at 968 F.2d 865. The opinion of the district court denying petitioner's motion for summary judgment on the ground of qualified immunity (Pet. App. 2a-7a) is unreported.

JURISDICTION

The court of appeals entered its order summarily dismissing petitioner's appeal on November 17, 1994. Pet. App. 1a. The petition for a writ of certiorari was filed on January 20, 1995, and was granted on March 27, 1995. The Court has jurisdiction under 28 U.S.C. § 1254(1). Certiorari jurisdiction under § 1254(1) includes jurisdiction to review an order of the court of appeals dismissing an interlocutory immunity appeal for lack of jurisdiction. *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982).

STATUTORY PROVISION INVOLVED

Petitioner's appeal was dismissed on the ground that the court of appeals lacked jurisdiction under 28 U.S.C. § 1291, as construed in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Pet. App. 1a. Section 1291 states in pertinent part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . . "

STATEMENT

Petitioner John Behrens, presently an employee of the federal Office of Thrift Supervision, served for several years as a designated supervisory agent for the Federal Home Loan Bank Board. In 1989 Behrens was sued by respondent Robert Pelletier for advising a federally insured savings institution that the Bank Board could not proceed to approve Pelletier as the institution's managing

officer until federal regulators had completed a pending investigation of Pelletier's role in the failure of another thrift that had previously employed him. Behrens' statement respecting the investigation was indisputably true; the action he took was not only reasonable on its face but in complete compliance with regulatory policy. Seven years later, Behrens is still entangled in *Bivens* litigation initiated by Pelletier.[1] The district court denied both a dismissal and a later summary judgment motion based on the defense of qualified immunity without providing an immunity analysis or indeed using the word "immunity" in either of the two orders. On Behrens' appeal from the district court's adverse dismissal decision, the Ninth Circuit chose to accept a "complaint [which] raises at most nebulous theories of conspiracy" as adequate pleading, although noting that it was plainly "insufficient to survive a motion for summary judgment." When the district court denied the subsequent summary judgment motion, Behrens again appealed on the ground that the facts alleged and adduced by Pelletier showed no unreasonable violation of clearly established law. The Ninth Circuit dismissed the appeal, retroactively applying to Behrens a circuit rule prohibiting jurisdiction over any second pretrial immunity appeal regardless of the issue presented. This Court granted certiorari to decide whether, in view of the Court's decision in *Mitchell v. Forsyth*, the court of appeals may refuse jurisdiction over

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[1] *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388 (1971).

Behrens' appeal from the denial of his summary judgment motion solely because he took an earlier appeal from the denial of his motion to dismiss.

A. The *Bivens* Action

Pioneer Savings was a California-chartered institution which applied to the Federal Home Loan Bank Board in 1984 for federal insurance of its accounts. Pet. App. 11a. The Bank Board, the federal agency then responsible for regulating savings and loan associations, granted the application conditionally: it expressly required Pioneer to "provide for the employment of a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent." Pet. App. 12a n.2. Pioneer hired Pelletier as its managing officer in March 1985, then requested the necessary Bank Board approval.

Pelletier previously had been senior vice president of another thrift, Beverly Hills Savings and Loan Association, where he supervised the major loan division and was a member of the Senior Loan Committee. Pet. App. 12a. Shortly after Pelletier began his employment with Pioneer, the Bank Board declared Beverly Hills Savings insolvent and placed it in receivership. Pet. App. 12a. The Bank Board and the Federal Savings and Loan Insurance Corporation then commenced an investigation of the activities of several of the failed institution's senior officers, including Pelletier. Pet. App. 12a-13a.

Petitioner John W. Behrens was the Bank Board's designated supervisory agent for certain savings and loan associations in the Eleventh District, one of them Pioneer Savings. Pet. App. 13a n.4. As supervisory agent, Behrens

notified Pioneer's board of directors by letter dated May 8, 1986 that the Bank Board could not proceed with Pioneer's pending application for approval of Pelletier's employment until the regulatory investigation into his conduct at Beverly Hills Savings was completed.[2] Upon

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[2] The full text of Behrens' May 8, 1986 letter, set out in the Ninth Circuit's published opinion on the prior Behrens appeal, is as follows:

> This is in response to the application by Pioneer Savings, requesting approval for Mr. Robert Pelletier to become managing officer of the association. We wish to advise you that an inquiry is currently being conducted by the Federal Savings and Loan Insurance Corporation (FSLIC) into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete. In this regard, we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills Savings is complete.
>
> In view of the foregoing, we believe it is imperative that the Board of Directors initiate a search for a new managing officer without delay. We ask that you keep this office advised as to your progress in this regard.

Pet. App. 13a. That Behrens' statement regarding the FSLIC investigation was true is not and never has been disputed by Pelletier. The regulatory investigation ultimately resulted in a suit by FSLIC against Pelletier and other Beverly Hills Savings officers, *FSLIC v. Fitzpatrick*, No. CV 86-6780 (C.D. Cal. 1990), for breach of fiduciary duty, negligence and other misconduct. J.A. 12. The current action was originally filed as a third-party claim in that litigation.

receipt of Behrens' letter, Pioneer's directors asked Pelletier to resign, then fired him when he refused. Pet. App. 14a. Pelletier's lawsuit against Behrens, the Bank Board and the United States followed. J.A. 7.

Pelletier's *Bivens* claims against Behrens fall into two groups involving related factual predicates. One group is based on the May 1986 letter from Behrens to Pioneer which Pelletier contends resulted in termination of his employment. J.A. 12. The other involves what the court of appeals characterized as "nebulous theories of conspiracy" to prevent Pelletier, after termination, from obtaining a similar position elsewhere. J.A. 13; Pet. App. 22a. In May 1989, Behrens moved to dismiss all the *Bivens* claims, asserting a statute of limitations defense and, alternatively, a qualified immunity defense. Pet. App. 14a. At the same time, Behrens filed a request under the Westfall Act, 28 U.S.C. § 2679, to substitute the United States as defendant in place of Behrens on parallel common law tort claims. Pet. App. 15a.

In an October 5, 1989 order issued without a memorandum opinion, the district court dismissed the job-termination claims as time-barred, but left standing the claims based on alleged interference with Pelletier's search for other employment. J.A. 46-50. The order did not address the Westfall Act substitution issue, nor did it make any specific reference at all to the qualified immunity defense that was the heart of the motion. J.A. 46-50.

B. The First Interlocutory Appeal

In November 1989, Behrens filed a pretrial appeal of the district court's order. J.A. 42-44. Behrens asserted the

court had erred in failing to dismiss the *Bivens* interference claims on the ground of qualified immunity, and in failing to approve Westfall Act substitution on the common law tort claims.[3]

The Ninth Circuit's June 1992 opinion on the first interlocutory appeal acknowledged that under *Mitchell v. Forsyth*, orders denying dismissal and orders denying summary judgment on qualified immunity claims are both appealable final orders. Pet. App. 17a. However, the appellate court chose to make Behrens' initial immunity appeal the vehicle for imposing a substantial restriction on *Mitchell* appeal rights in the Ninth Circuit. The panel announced: "If the district court determines that a defendant's entitlement to qualified immunity is not established at the motion to dismiss stage, he appeals at his peril," because the court of appeals will refuse to hear a second pretrial appeal at the summary judgment stage. Pet. App. 17a-19a.

After stating its new one-appeal limitation, the appellate panel proceeded to review the denial of Behrens'

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[3] At oral argument the court of appeals noted that it could not determine from the district court's terse order whether the court had even considered the Westfall Act substitution issue. Pet. App. 16a. The panel therefore vacated submission of the appeal and remanded the case for the limited purpose of obtaining a clear ruling. Pet. App. 16a. After the district court entered an order denying Westfall substitution, the panel reinstated the appeal and issued its opinion on both the immunity and the substitution issues. Pet. App. 16a. Reversing the denial of substitution, the court of appeals held that all of Behrens' alleged activities, including the May 8, 1986 letter, were within the scope of his employment as a federal official. Pet. App. 32a.

motion to dismiss the interference claims on immunity grounds. Pet. App. 20a-24a. It concluded that the "nebulous theories of conspiracy" alleged in Pelletier's complaint were adequate for pleading purposes, but would not survive a summary judgment motion based on the qualified immunity defense. Pet. App. 22a. Further, the panel observed in a footnote that the district court had applied the wrong statute of limitations to Pelletier's job-termination claims. Pet. App. 15a n.6. Although the dismissal of the job-termination claims had not been appealed and they were not before the appellate court in any form, the court's comment effectively revived them. Pet. App. 3a. The panel suggested that summary judgment should easily dispose of those claims as well.[4]

Behrens immediately sought rehearing, principally to urge that the one-appeal discussion be omitted from the opinion as dictum. J.A. 269-81. The petition for rehearing also pointed out that the panel's single-appeal pronouncement directly conflicted with another published Ninth Circuit opinion: in *Fry v. Melaragno*, 939 F.2d 832, 835 n.5 (9th Cir. 1991), a different panel had expressly noted that a *Bivens* defendant is entitled to two interlocutory immunity appeals. J.A. 278-81. The *Pelletier* panel denied rehearing on September 24, 1993. J.A. 282. The court of

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[4] The court of appeals noted that the Ninth Circuit had never decided whether private employment contingent on regulatory approval, like Pelletier's job with Pioneer, involves any constitutionally protected interest. Pet. App. 21a. In short, the panel directed the district court's attention to the absence of any "clearly established constitutional right" supporting the newly resurrected job-termination claims. *Siegert v. Gilley*, 500 U.S. 226 (1992).

appeals decision was then published. *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992); Pet. App. 10a-33a.

C. The Second Interlocutory Appeal

Litigation resumed, and after submitting to full discovery Behrens made the summary judgment motion the appellate opinion had indicated should resolve the immunity issues in his favor. J.A. 283-309. In September 1994, without oral argument, opinion or analysis, the district judge denied Behrens' summary judgment motion as to all claims, including the job-termination claims excluded from the previous appeal. Pet. App. 5a-6a. Like the earlier dismissal order, the order denying summary judgment never mentions qualified immunity, and offers no indication that the court in fact undertook any immunity analysis at all. Pet. App. 2a-7a. The case was then set for jury trial on May 16, 1995. J.A. 5.

Behrens filed a timely notice of appeal under 28 U.S.C. § 1291. J.A. 5. Pelletier moved to dismiss the appeal for lack of jurisdiction, claiming the earlier appellate decision was dispositive on the jurisdictional issue. J.A. 373-83. On November 17, 1994, a Ninth Circuit motions panel entered a summary dismissal order citing *Nelson v. Silverman*, 999 F.2d 417, 418-19 (9th Cir. 1993). Pet. App. 1. The *Nelson* decision, rendered after *Pelletier v. FHLB-SF*, declared the one-appeal rule a "categorical" one admitting of no exceptions and dismissed a second appeal for lack of jurisdiction. In the same order, the court of appeals denied a stay pending application for a writ of certiorari. Pet. App. 1a.

On January 20, 1995 Behrens filed a petition for a writ of certiorari and an application for a stay of proceedings in the district court. The stay was granted on February 21, 1995, and the writ of certiorari on March 27, 1995.

SUMMARY OF ARGUMENT

The Ninth Circuit's rule prohibiting on jurisdictional grounds any second pretrial qualified immunity appeal is misdirected, arbitrary in its effect, and at odds with this Court's case law on both the qualified immunity and the collateral order doctrines.

1. To insure that government defendants realize the benefit of the qualified immunity defense before it is lost in on-going litigation, the Court formulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Mitchell v. Forsyth*, 472 U.S. 511 (1985), an "objectively-determined immediately-appealable immunity from suit." *Wyatt v. Cole*, 504 U.S. 158, 166 (1992). *Harlow* expressly tailored qualified immunity as an objective defense to be resolved by pretrial motion, and the later decisions of the Court "repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). The one-appeal rule effectively destroys qualified immunity *as an immunity from suit*. When the key to the court of appeals' gate will turn only once, prudence dictates that it be used not as early as possible in the case but as late as possible – literally in the last hour before trial, when pretrial protection has been irretrievably lost.

Further, empirical evidence indicates that approximately 70% of the pretrial appeals from district court orders denying qualified immunity are successful. Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165, 1189-90 (1990). Thus, the abuse of the judicial system that is the Ninth Circuit's stated reason for the one-appeal rule appears to be a misperception; and the coerced deferral of appellate review which is a principal feature and purpose of the rule will exact an extremely high price in valid immunity entitlements lost to delay.

2. The legal predicate for the restriction, the theory that a defendant's first pretrial appeal on any immunity issue exhausts the jurisdiction of the courts of appeals under the collateral order doctrine, is erroneous. It cannot be reconciled with this Court's decision in *Mitchell v. Forsyth*, which was itself a second immunity appeal, and which was reviewed by this Court under certiorari jurisdiction predicated upon the existence of second-appeal jurisdiction in the court of appeals below. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

3. The one-appeal rule abridges, on economy and efficiency grounds, the appealable-order class this Court described in *Mitchell*. To the extent the concerns expressed by the court of appeals reflect more than a mistaken belief that frivolous appeals predominate in immunity cases, those concerns do not outweigh prompt enforcement of the qualified immunity entitlement. As the Court recently confirmed, collateral orders are designated appealable or nonappealable by category, with categories determined at the level of the right asserted. *Digital Equipment v. Desktop Direct, Inc.*, 114 S.Ct. 1992,

1996 (1994). The right to immediate review of an order denying qualified immunity is a function of the stature of the immunity entitlement itself, its "good pedigree in public law" and sound policy base. *Id.* at 2000-01. Petitioner Behrens' current appeal raises core immunity issues that place it squarely within the *Mitchell* definition of an appealable qualified immunity order: whether Behrens' conduct, as defined by the post-discovery record, constitutes an unreasonable violation of clearly established law. The substance of the immunity claim denied by the district court's erroneous summary judgment order is not altered by the fact that Behrens previously appealed an adverse dismissal order; nor is the order appealed less final by any collateral-order test because it is challenged on a second appeal.

While the sometimes cumbersome nature of the pretrial review process may counsel against expanding the *Mitchell* appealable-order category, *Johnson v. Jones*, 115 S.Ct. 2151 (1995), it is not a ground for denying immediate appeal on those definitive qualified immunity issues *Mitchell* held " 'too important to be denied review.' " *Mitchell*, 472 U.S. at 524 (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546); *see Johnson*, 115 S.Ct. at 2155.

4. Finally, a categorical one-appeal limitation imposed at the court of appeals' level impermissibly encroaches upon the authority Congress has granted this Court to "define or refine when a district court ruling is 'final' and when an interlocutory order is appealable" through the rulemaking process provided in 28 U.S.C. § 2072. *Swint v. Chambers County Commission*, 115 S.Ct. 1203, 1211 (1995). The Ninth Circuit's own power to

promulgate circuit procedural rules does not extend to a rule that is explicitly jurisdictional in purpose and effect, as the single-appeal restriction is. *Thomas v. Arn*, 474 U.S. 140, 146 (1985). If additional controls on pretrial immunity appeals are desirable, the statutory rules procedure designated by Congress and supervised by this Court is a far more appropriate means than the Ninth Circuit's arbitrary and analytically flawed one-appeal rule.

ARGUMENT

I. THE ONE-APPEAL RESTRICTION BREAKS THE BACK OF THE QUALIFIED IMMUNITY DEFENSE

A. This Court Has Consistently Held That Qualified Immunity Is A Full Immunity From Suit Which Must Be Established As Early As Possible To Achieve Its Purpose

The Court has labored steadily since 1982 to construct a qualified "immunity from suit" with three components: protection from liability, trial, and pretrial burdens such as discovery. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 525-29 (1985). In *Harlow*, the Court concluded that the subjective good faith immunity available to public officials under the common law entailed unacceptably high social costs. Scrutinizing the thought processes behind official judgment calls involved detailed inquiry into motives and a full jury trial to resolve the good faith issues. The inevitable result, as civil rights suits lumbered through depositions, motions and trial, was "distraction of officials from their governmental duties, inhibition of discretionary

action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816. Of particular concern to the Court was the kind of "broad-ranging discovery . . . [that] can be peculiarly disruptive of effective overnment." *Harlow*, 457 U.S. at 817.

To achieve a workable balance between the legitimate claims of civil rights plaintiffs and the public's interest in the smooth functioning of its government, the Court stripped the qualified immunity defense of the subjective elements that routinely required jury determination. Since *Harlow*, an official's entitlement to qualified immunity turns on the "objective reasonableness of [his] conduct, as measured by reference to clearly established law," a formulation designed to immunize all government defendants save those who have committed a clear violation of "basic, unquestioned constitutional rights." *Harlow*, 457 U.S. at 818, 815. *Harlow*'s stated purpose was to transform qualified immunity from a triable defense to a question of "objective legal reasonableness" properly disposed of by pretrial motion. *Harlow*, 457 U.S. at 818-19. The Court expressly held: "Until this threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818.

Three years after *Harlow*, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court confirmed that qualified immunity is not a mere shield against liability but a full immunity from suit which encompasses the "right not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526-27. As such, qualified immunity is steadily eroded and eventually lost irretrievably as litigation progresses. The Court therefore held that when qualified

immunity is denied, immediate appellate access is essential to prevent immunity protection from being destroyed before it can be vindicated: "[D]enial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets" the traditional *Cohen* tests for treating an order as " 'final' within the meaning of § 1291." *Mitchell*, 472 U.S. at 527, 524, *citing Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). In sum, dismissal and summary judgment orders are equally appealable so long as they reflect a refusal to afford immunity as a matter of law. *Mitchell*, 472 U.S. at 527-30.

The Court's later qualified immunity decisions have adhered firmly to the *Harlow/Mitchell* principle that immunity should be asserted and established as early as possible in the litigation process, because "even such pretrial matters as discovery are to be avoided if possible." *Mitchell*, 472 U.S. at 526; *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Indeed, the majority in *Anderson v. Creighton* described dismissal or summary judgment prior to any substantial discovery as "the driving force behind Harlow[ ]." *Anderson*, 483 U.S. at 640 n.2, 646 n.6. The dissenting Justices agreed that the defense should be determined "not only in advance of trial, but *of equal importance*, before the time-consuming pretrial discovery process commence[s]." *Anderson*, 483 U.S. at 650 (Stevens, J., joined by Brennan, J. and Marshall, J., dissenting) (emphasis added); *see also Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (one purpose of immunity is to "spare a defendant

. . . unwarranted demands customarily imposed upon those defending a long drawn out lawsuit").[5]

In the context of the Court's consistent emphasis on the importance of pretrial immunity protection, the most straightforward reading of *Mitchell v. Forsyth* is that a civil rights defendant may take two interlocutory immunity appeals: once at the pleading stage, before discovery protection is invaded; and again, if necessary, on a developed factual record before the case is consigned to trial. *Mitchell*, 472 U.S. at 526. Three circuit courts of appeal have so construed *Mitchell*.[6] The Ninth Circuit and two others, however, interpret *Mitchell* as identifying several opportunities for immediate appeal but permitting use of the appeal right only once. Pet. App. 17a-18a; *Abel v. Miller*, 904 F.2d 394 (7th Cir. 1990); *Kaiter v. Town of Boxford*, 836 F.2d 704 (1st Cir. 1988).

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[5] *Anderson* also made it clear that discovery protection extends not merely to the state of mind evidence *Harlow* focused on, but to hard factual evidence as well. 483 U.S. at 637-38 (facts that gave rise to probable cause conclusion).

[6] *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) (civil rights action involving immunity defense may give rise to "not one but two interlocutory appeals"); *Murphy v. Morris*, 849 F.2d 1101, 1104 (8th Cir. 1988) (limiting defendant to one appeal "would undercut the value of the . . . immunity defense"); *Kulwicki v. Dawson*, 969 F.2d 1454, 1460 n.5 (3d Cir. 1992) ("It is generally understood that *Mitchell* contemplates appeals from denials of immunity at either or both of these stages in civil rights proceedings") (dictum). The Third Circuit, which recently produced *Kulwicki*, previously held in *Forsyth v. Kleindienst*, 700 F.2d 104, 105 (3d Cir. 1983), that it had jurisdiction over a second interlocutory appeal of absolute immunity.

The one-appeal rule is framed as an inflexible jurisdictional bar. *E.g., Nelson v. Silverman*, 999 F.2d at 419. That construction of *Mitchell* destroys the pretrial protection at the core of qualified immunity: it effectively insures that a defendant who loses a prompt motion to dismiss will permanently forfeit his pretrial immunity entitlement, even when the ruling is plainly wrong, because he cannot afford to risk his single appeal early in the case.

B. The One-Appeal Rule Routinely Compels Defendants To Delay Appealing Immunity Denials Until The Eve of Trial

Under the one-appeal rule, the substantive immunity entitlement becomes a hostage to litigation strategy decisions. Determining whether there has been an unreasonable violation of settled law requires some factual context both to identify the governing law and to evaluate objective reasonableness. *E.g., Anderson*, 483 U.S. at 641 (reasonableness is "objective (albeit fact-specific)"). How much context is necessary is often difficult to judge. *See Siegert v. Gilley*, 500 U.S. at 285 (district court erred in requiring "more developed record" for immunity analysis). A defendant who believes he can prevail even on the facts pleaded in the plaintiff's complaint will make the early motion to dismiss encouraged by *Harlow* and *Mitchell*. Dismissal will be denied if the district court believes either that the allegations, if proved, preclude immunity; or that objective reasonableness cannot be determined without more specific factual data. *See Mitchell*, 472 U.S. at 527-28. For the defendant, the adverse

ruling means months or even years of continued litigation and discovery unless he invokes his interlocutory appeal right. However, in the Ninth Circuit he exercises that right, in the court of appeals' candid phrase, "at his peril." Pet. App. 19a.

The defendant's peril, however, is also the peril of his office, his professional colleagues and the integrity of governmental functions he performs. Should the defendant appeal the denial of his motion to dismiss, his risk is that the court of appeals will decide he miscalculated the degree of factual specificity necessary for a decision in his favor. The result of his strategic error is both harsh and arbitrary: a later summary judgment order erroneously denying immunity on the developed factual record and sending him to trial is appeal-proof, no matter how clearly erroneous the denial may be.

Only the rashly confident defendant, or the foolhardy, would consider taking up the Ninth Circuit's gauntlet. The one realistic course open to a *Bivens* defendant whose motion to dismiss is wrongly denied is to forego the appeal unless and until trial is imminent. In the interim, the official himself, his office and his professional associates are subjected to intimidating depositions, disruptive document production and time-consuming pretrial litigation entanglements that should have been averted.

Delaying appeal until the eve of trial, when pretrial immunity has been irreparably lost, is not merely an unfortunate side effect of the one-appeal rule. It is the aim. See Pet. App. 19a; *Kaiter v. Town of Boxford*, 836 F.2d at 708 (single appeal may be taken only when "trial is

. . . inevitable"). In short, while the driving force behind *Harlow/Mitchell* immunity is termination of doomed lawsuits before the immunity defense has lost its value, the Ninth Circuit has said: Appeal your immunity claim before discovery is closed and the trial date set if you dare.

As significantly, the federal benches that have adopted a one-appeal rule are forcing individual defendants to pick and choose among the elements of a unified defense that was created for the benefit of the public, not primarily for the benefit of the individual. *Wyatt v. Cole*, 504 U.S. 158, 163 (1992) ("the qualified immunity recognized in *Harlow* acts to safeguard government, and thereby to protect the public at large, not to benefit its agents"). The Ninth Circuit, for example, stated that petitioner Behrens was free to elect between an immediate appeal of the order denying dismissal, and a delayed, post-discovery appeal at the summary judgment stage: "Behrens has chosen the former route. We affirm his right to make that choice." Pet. App. 19a; *see also Kaiter*, 836 F.2d at 708 (defendant may elect immediate, pre-discovery appeal if he expressly "waives any right to file additional interlocutory appeals").

Behrens in fact was given no such choice. The strategic decision to burn Behrens' bridge to the appellate court was made by the Ninth Circuit, which inserted its one-appeal restriction in the opinion resolving his first appeal. However, even if Behrens had been warned in advance that immediate defense of his immunity claim at the motion to dismiss stage would put his ultimate trial protection at risk, more is at stake than an individual's

personal preference. Whether and to what extent government operations shall be shielded from intrusive pretrial litigation burdens is not wholly a private consideration. The Court made that decision in *Harlow* on the basis of the broader public interest at stake, and the balance achieved there should not be restruck in every *Bivens* case by each individual defendant. That, however, is a practical effect of the one-appeal rule.

The Ninth Circuit's rule limiting government officials to one pretrial immunity appeal effectively edits pretrial protection out of this Court's articulation of qualified immunity, and frustrates the *Harlow/Mitchell* policy that valid immunity entitlements be enforced before they are lost.

C. As Seventy Percent Of Interlocutory Appeals From Orders Denying Qualified Immunity Result In Reversal, Regular Deferral Of Appeals Will Mean Routine Loss Of Valid Immunity Entitlements

The damage the one-appeal rule inflicts on the qualified immunity doctrine is not merely theoretical. Empirical evidence suggests that the coerced deferral of immunity appeals effected by the rule will result in frequent, arbitrary loss of valid immunity rights.

The rationale for the one-appeal rule consists in large measure of the courts of appeals' frankly stated suspicion that pretrial immunity appeals are frequently misused. *E.g.*, Pet. App. 18a-19a; *Nelson v. Silverman*, 999 F.2d at 419; *Kaiter v. Town of Boxford*, 836 F.2d at 708; *Abel v. Miller*, 904 F.2d at 397. The Ninth Circuit's explicit

assumption in *Pelletier* and *Nelson* was that "the practice of filing routine appeals from denials of pretrial motions for qualified immunity, even in cases in which the district court was clearly correct, evinces a flagrant disregard for the Court's intent in creating the qualified immunity doctrine." Pet. App. 17a-19a. The Ninth Circuit concluded, therefore, that "limiting defendants to one bite at the apple will [not] be 'peculiarly disruptive of effective government.' " Pet. App. 19a, *quoting Harlow v. Fitzgerald*, 457 U.S. at 817.

In fact, an examination of the appellate reversal rate for district court orders denying qualified immunity indicates that erroneous denials are the rule rather than the exception. A 1990 law review article by Professor Michael E. Solimine compared the federal appellate courts' general reversal rate for appeals decided on the merits with the reversal rate on interlocutory appeal of pretrial orders denying qualified immunity in civil rights cases. Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165, 1189-90 (1990). Professor Solimine used figures from the Administrative Office of the United States Courts for the overall appellate reversal rate – 13.8% for appeals terminated on the merits in 1989 – and interlocutory immunity appeal data obtained from a Lexis search. He found that of the interlocutory orders denying qualified immunity reviewed by the courts of appeals in published decisions during the three-year period from 1987 through 1989, *"approximately 70% were reversed in whole or in part – a figure almost five times the ordinary reversal rate for all appeals of final decisions on the merits."* Solimine, *supra*, at 1190 (emphasis added).

Although the interlocutory appeal cases he examined all post-dated *Harlow* by five to seven years, Professor Solimine speculated that the extraordinarily high reversal rate might decrease as additional appellate precedent was generated and the district courts became more familiar with legal standards for qualified immunity motions. *Id.* However, figures for 1994 reveal little change, if any, in the ensuing five years. The Administrative Office's annual report for 1994 places the general reversal rate for appeals terminated on the merits at 10.4%, with civil matters in the 14% range. *Judicial Business of the United States Courts, Report of the Director* (1994), Table B-5, p. A-9 (App. 1a). Conducting the same Lexis search for the year 1994 that Professor Solimine used for 1987-1989 reveals that in published opinions on the merits from the federal courts of appeals, interlocutory orders denying qualified immunity were wholly or partially reversed 70% of the time; including unreported opinions yields a 60% reversal rate. Finally, appeals of orders denying dismissal (the group that the one-appeal rule effectively abolishes) have a reversal rate of 70% – about five times the general civil figure, and seven times the overall rate.[7]

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[7] Professor Solimine's Lexis search request was: Qualif! w/2 immunity w/5 den! and collateral or interlocutory or Mitchell and date bef Jan 1 1990 and date aft Jan 1 1987. He discarded 66 of the 200 cases found because they did not reflect a decision on the merits of the immunity issue. Solimine, *supra*, at 1189 n.136. The 1994 data in the text was obtained by running the same search with the date parameters adjusted to "date (aft 1993 and bef 1995)." The library used was Genfed and the file USApp. The search generated 107 cases. Twenty-one were eliminated because they were not defendants' appeals decided on the merits of the immunity issue, yielding a 60% reversal rate.

In sum, qualified immunity is an area where, in the judgment of the courts of appeals, the district courts err substantially more often than not. To strip trial immunity from defendants who take a pre-discovery appeal and send them to trial on summary judgment orders, more likely than not to be erroneous, frustrates in a wholly arbitrary manner the immunity doctrine articulated by this Court. Moreover, immunity claimants who yield to the pressure of the rule and defer their one appeal until the eve of trial will, in most cases, have endured precisely the "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit" that the immunity protection to which they were legally entitled should have spared them. *Siegert*, 500 U.S. at 232. An inflexible jurisdictional rule limiting civil rights defendants to one interlocutory immunity appeal literally breaks the back of the qualified immunity defense.

Another 26 can be eliminated because they were designated not to be published, yielding a 70% reversal rate. As Professor Solimine cautions, the resulting figures probably are not exact for a number of reasons related to the lack of specificity of portions of the data. See Solimine, *supra*, at 1189 n.137. It should also be noted that the general reversal figures provided by the Administrative Office of the United States Courts appear to include interlocutory appeals decided on the merits. Inclusion of interlocutory immunity appeals would skew the general rate upward slightly, understating the real gap between general reversal and interlocutory immunity reversal rates.

II. A JURISDICTIONAL BAR AGAINST ALL SECOND INTERLOCUTORY IMMUNITY APPEALS IS DIRECTLY AT ODDS WITH *MITCHELL V. FORSYTH*

The premise of the one-appeal rule, that no court of appeals jurisdiction lies under 28 U.S.C. § 1291 for any second interlocutory immunity appeal, is inconsistent with both the reasoning and the procedural posture of the case that established the immediate appealability of qualified immunity claims, *Mitchell v. Forsyth*.

The *Mitchell* case had its origin in a civil rights suit against former Attorney General John Mitchell and others, alleging illegal use of wiretaps. Mitchell initially appealed to the Third Circuit a district court order denying his motion for summary judgment on defenses of both absolute and qualified immunity. *Forsyth v. Kleindienst* (*"Forsyth I"*), 599 F.2d 1203, 1205-06 (3d Cir. 1979); see *Mitchell v. Forsyth*, 472 U.S. at 516. The court of appeals dismissed the appeal as to qualified immunity on the ground that it was not an appealable order, but heard and decided the absolute immunity appeal. The case was then remanded to the district court for further consideration on an augmented factual record. *Forsyth I*, 599 F.2d at 1217.

In the trial court once more, Mitchell filed another summary judgment motion, again asserting absolute and qualified immunity. The district court denied the motion on both issues. *Mitchell v. Forsyth*, 472 U.S. at 516-17. In the words of this Court, "Mitchell again appealed, contending that the District Court had erred in its rulings on

both absolute immunity and qualified immunity." *Mitchell*, 472 U.S. at 517.

The second interlocutory appeal was referred initially to a Third Circuit motions panel for resolution of jurisdictional and stay issues. *Forsyth v. Kleindienst* ("*Forsyth II*"), 700 F.2d 104 (3d Cir. 1983). Although the panel majority found jurisdiction over the absolute immunity appeal, it did so in the face of a forceful dissent from Judge Sloviter protesting the "grant of interlocutory review to Mitchell *a second time* under the collateral order doctrine." *Id.* at 109 (emphasis added). The focus of the dissent's objection was that Mitchell was seeking review of the same facts and legal issues considered on the first appeal. *Id.* at 106, 110. Citing both judicial economy and the limits of the collateral order doctrine, Judge Sloviter argued strongly that the court of appeals lacked § 1291 jurisdiction over Mitchell's second immunity appeal, and should dismiss it as "frivolous in light of the Third Circuit's earlier consideration of the same issue." *Id.* at 106-110; *Mitchell v. Forsyth*, 472 U.S. at 518 n.3. The second immunity appeal was transferred from the motions panel to a merits panel, which subsequently issued a decision adverse to Mitchell. *Forsyth v. Kleindienst* ("*Forsyth III*"), 729 F.2d 267 (3d Cir. 1984).

On certiorari, the Court carefully acknowledged both the status of the appeal as a second one, and the jurisdictional objection below. *Mitchell*, 472 U.S. at 517, 518 n.3. If the jurisdictional proposition embodied in the one-appeal rule were correct, Mitchell's initial absolute immunity appeal would have exhausted the interlocutory-appeal jurisdiction of the Third Circuit and fenced the case out of the court of appeals with respect to *all* immunity issues,

absolute or qualified.[8] This Court would then have been obliged to note a defect in its own certiorari jurisdiction:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. . . . "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."

Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986) (brackets in original, citations omitted); *see Swint v. Chambers County Commission*, 115 S.Ct. 1203, 1206 (1995) (Supreme Court will not reach the merits if the court of appeals lacked jurisdiction).

In fact, the Court decided the *Mitchell* absolute immunity appeal on the merits, implicitly affirming the conclusion of the *Forsyth II* majority that § 1291 jurisdiction over the second interlocutory immunity appeal properly lay in the court of appeals. Moreover, after it disposed of absolute immunity, the Court conducted an intensive examination of the appealability of qualified

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[8] *See Kaiter v. Town of Boxford*, 836 F.2d at 707 (absolute and qualified immunity are not only subject to the same appeal rules but must both be raised in the same single appeal); *Abel v. Miller*, 904 F.2d at 397 (appellate courts are limited to "[o]ne full and fair review on the question 'shall there be a trial?' ").

immunity claims. It concluded that a qualified immunity defense which shares the essential attributes of absolute immunity must be appealable on the same basis as absolute immunity. *Mitchell*, 472 U.S. at 525-30. Nowhere in its analysis did the Court state or suggest that the jurisdiction the Third Circuit exercised over a second absolute immunity appeal would not exist if the two appeals had involved only qualified immunity.

It may fairly be said that *Mitchell* did not expressly state whether qualified immunity is appealable once or twice, only that it is appealable. However, what the Court did with the second pretrial immunity appeal in *Mitchell* cannot be reconciled with the jurisdictional analysis underlying the Ninth Circuit's one-appeal rule.

III. THE ONE-APPEAL RULE CONTRAVENES GOVERNING CASE LAW ON THE COLLATERAL ORDER DOCTRINE

A. This Court Has Held That For Purposes Of The Collateral Order Doctrine, The Category Of Appealable Decisions Consists Of Orders Denying Qualified Immunity Claims

The one-appeal rule formulated by the Ninth Circuit bars all second immunity appeals as a class. *Nelson v. Silverman*, 999 F.2d at 419. The categorical approach to appealability adopted in *Nelson* is fundamentally sound, as this Court has recently confirmed. *Digital Equipment v. Desktop Direct, Inc.*, 114 S.Ct. at 1996 ("appealability under § 1291 is to be determined for the entire category to which a claim belongs"); *Johnson v. Jones*, 115 S.Ct. at 2157 ("We of course decide appealability for categories of

orders rather than individual orders"). However, the Ninth Circuit's application of the principle is erroneous, and its result is wrong.

The touchstone the Court used in *Digital Equipment* to distinguish an appealable from a nonappealable class of orders is whether the *right* involved "rise[s] to the level of importance needed for recognition under § 1291": that is, whether the right "qualifies as 'important' in *Cohen*'s sense, as being weightier than the societal interests advanced by the ordinary operation of the final judgment principles." *Digital Equipment*, 114 S.Ct. at 2001, 2002; *see also United States v. MacDonald*, 435 U.S. 850, 860 n.7 (1978) ("substance of the rights entailed . . . is dispositive"). The determination that qualified immunity rights outweigh ordinary final judgment considerations was made in *Mitchell v. Forsyth*, which unequivocally placed qualified immunity in the small class of claims " 'too important to be denied review'." *Mitchell*, 472 U.S. at 524, *quoting Cohen*, 337 U.S. at 546. *Mitchell* also identified the orders that constitute the appealable category as those "den[ying] a defendant's motion for dismissal or summary judgment" on a legal immunity issue. *Mitchell*, 472 U.S. at 527. The Court underscored the functional unity of that category later, when it literally defined qualified immunity in its modern form as "the objectively-determined, immediately-appealable immunity from suit accorded certain government officials under *Harlow*." *Wyatt v. Cole*, 504 U.S. at 166 n.2.

B. No Collateral Order Principle Supports A Rigid Distinction Between First And Second Qualified Immunity Appeals

In its most recent collateral order decision, *Johnson v. Jones*, the Court declined to expand *Mitchell* appealability beyond orders of the type involved in the earlier case: adverse substantive determinations on the objective reasonableness of the defendant's conduct in light of settled law. *Johnson* held unappealable an order which, "though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Johnson*, 115 S.Ct. at 2156. Acknowledging that either type of order may force a trial which should have been precluded, the Court found that close ties between pure evidence sufficiency issues and the merits of the case, coupled with the inherent inefficiency of reviewing wholly factual matters at the appellate level, counseled against expanding the *Mitchell* category to orders dealing only with sufficiency of the evidence. *Id.* at 2156-58.

This Court's reluctance to enlarge *Mitchell* does not imply that the court of appeals is free to abridge the appealable-claims class established in *Mitchell*. The one-appeal rule, however, has that effect. It reshuffles appeals that do raise substantive qualified immunity issues, and that fall squarely within the category delineated in *Mitchell*, into "previous appeal" and "no previous appeal" subgroups, barring the latter from the court of appeals. The inappropriateness of the Ninth Circuit's procedure is apparent from the collateral order analysis used in *Johnson*.

The Court's first step in *Johnson* was to "consider *Mitchell* itself, purely as precedent." *Johnson*, 115 S.Ct. at 2156. From that perspective, there is no argument that *Mitchell* is precedent for sorting second appeals out of the appealable-claims category. The case itself dealt with a second interlocutory immunity appeal.

Next, the Court considered whether the *Johnson* petitioners' claims qualified as "conceptually distinct from the merits," and concluded that they did not. *Johnson*, 115 S.Ct. at 2156-57. It is clear simply from comparing *Johnson* (a first appeal which involved no separable issue) and *Mitchell* (a second appeal raising a conceptually distinct immunity issue) that separability is a matter of the question presented, not a function of first-round or second-round status. That is borne out by petitioner Behrens' situation. Unlike the police officers in *Johnson*, Behrens does not ask the court of appeals to determine that the plaintiff's evidence is too sparse to warrant a trial on liability; nor does he admit, as the *Johnson* petitioners did, that if the plaintiff proves his allegations immunity is foreclosed.[9] Behrens' second appeal, like Mitchell's, raises a true immunity issue: accepting as historical fact that Behrens wrote the May 8, 1986 letter to Pioneer's board of directors, that the board used the letter to fire Pelletier, and that other prospective employers declined to hire Pelletier when they learned the reason for his departure from Pioneer, were Behrens' actions an unreasonable violation of clearly established law? The character of that

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[9] The *Johnson* petitioners "do not deny that *if* they beat the plaintiff, as he believes they did, then they lack immunity." *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994).

question as a pure immunity issue conceptually separate from the merits of the underlying case is unaffected by its second-appeal posture.

Thus, two of the appealability tests the Court applied in *Johnson* offer no basis for treating immunity orders challenged on a second appeal as a nonfinal subclass for purposes of the collateral order doctrine. The third factor the Court discussed – judicial economy – cannot alone bear the weight of the essentially arbitrary distinction reflected in the one-appeal rule.

The Ninth Circuit's single-appeal decisions, like those of the concurring circuits, cite docket control and conservation of judicial resources as adequate justification for a one-appeal restriction.[10] The court stated in

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[10] The only single-appeal decision to cite *Cohen* considerations other than pure economy is *Kaiter v. Town of Boxford*, 836 F.2d 704 (1st Cir. 1988). There, the First Circuit suggested that an order denying dismissal on immunity grounds is inherently nonfinal so long as there remains a possibility of a later summary judgment decision that would stave off a trial: it is "not conclusive . . . because trial is not inevitable." *Id.* at 708. The court reasoned that there can therefore be only one interlocutory immunity appeal, to be taken at the summary judgment stage as a matter of right or at the motion to dismiss stage by waiving any later summary judgment appeal. *Id.* The difficulty with the *Kaiter* analysis is its assumption that there is no irreparable deprivation of any significant immunity right, and therefore no collateral order finality, until the defendant has lost his ability at the district court level to avoid a trial. That is untenable in view of the emphasis in *Harlow*, *Anderson* and *Mitchell* on immunity's function as a shield against disruptive *pretrial* litigation entanglement as well as – and as much as – against trial and liability. *Anderson*, 483 U.S. at 640 n.2, 646 n.6; *Harlow*, 457 U.S. at 816-18; *Mitchell*, 472 U.S. at 526; *see Leatherman v. Tarrant*

Nelson and *Pelletier* that multiple appeals compound the "additional expense and delay" inherent in all interlocutory appeals; and it concluded that the single legal issue which determines qualified immunity – whether settled law clearly prohibited the defendant's actions – is "worth" only a single appeal. *Nelson v. Silverman*, 999 F.2d at 418; Pet. App. 19a.

As a practical matter, one economy concern given great weight in the Ninth Circuit's appraisal process, the sheer volume of pretrial appeals in immunity cases, has been significantly reduced by this Court's recent ruling in *Johnson v. Jones*. And nearly absent from the court of appeals' equation are the "countervailing benefits" *Johnson* examined: the importance of the qualified immunity right (*Mitchell*, 472 U.S. at 526; *Digital Equipment*, 114 S.Ct. at 2000) and "the danger of denying justice by delay." *Johnson*, 115 S.Ct. at 2157. Professor Solimine's reversal-rate data suggests that the risk of justice denied is a much weightier concern than the Ninth Circuit recognized, the number of frivolous appeals substantially smaller, and

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Narcotics Unit, 113 S.Ct. 1160, 1162 (1993) (right to avoid discovery is one of the distinctions between *Harlow* immunity from suit and mere defense to liability). Further, the potential for revisiting the immunity issue does not preclude finality when "the claim to *immediate* relief . . . is categorically and irretrievably denied. The court's decision *is* 'the final word on the subject' insofar as the time period between the court's initial denial and its subsequent reconsideration of the renewed motion is concerned." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 291 (1988) (Scalia, J., concurring) (italics in original). Thus, the point of both *Cohen* and *Mitchell* is that when a right of sufficient stature is in immediate jeopardy under an existing order, the deprivation effected by the order is "final."

the abuse of judicial resources by immunity claimants largely a misperception.

Moreover, the Ninth Circuit is incorrect in its assumption that a second appeal is inherently wasteful because it can be nothing more than a revisitation of the first. The Court has articulated, and Ninth Circuit qualified immunity cases recite, an immunity test that may involve not one legal immunity issue but two: whether the law is clearly established, and whether notwithstanding settled law the defendant's conduct is objectively reasonable under the circumstances of the case. *Anderson*, 483 U.S. at 641; *Mitchell*, 472 U.S. at 528; *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). Though closely related, the two questions are not identical. The first is often less fact-specific than the latter, more readily resolved on an early motion to dismiss, and more likely to dispose of the case at the prediscovery stage favored in the *Harlow/Mitchell* line of decisions. *See also Johnson v. Jones*, 115 S.Ct. at 2157-58 (noting that interlocutory appellate review is most efficient with sparser facts and "more abstract issues of law"). In those relatively few cases where second appeals prove necessary, they will most often involve a determination of objective reasonableness on a developed post-discovery factual record. Even from the court of appeals' economy-conscious perspective, deciding those occasional second appeals may well be more conservative of judicial resources, in view of the district courts' error rate, than

the alternative: lengthy, expensive litigation followed by post-trial appeal and reversal.[11]

Petitioner Behrens' case is an apt illustration of an entirely proper and nonrepetitive use of a second appeal. In its decision on Behrens' first appeal the Ninth Circuit both revived a set of *Bivens* claims that had previously been dismissed, and simultaneously declined to decide any immunity issues related to those claims because they were not part of the appeal. Pet. App. 12a n.2, 21a. The reinstated *Bivens* claims, now the heart of the lawsuit, are based on the May 1986 letter that resulted in termination of Pelletier's employment. The district court denied Behrens' later summary judgment motion on the revived job-termination claims as well as the previously appealed claims alleging interference with Pelletier's search for

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[11] *See, e.g., Hemphill v. Kincheloe*, 987 F.2d 589 (9th Cir. 1993). Plaintiff Wetmore was one of 100 Washington State Penitentiary inmates who filed civil rights actions against the officials responsible for WSP's body-cavity search policy. The defendants moved in one of the WSP cases for summary judgment on qualified immunity, which was denied on the ground that settled law required a legitimate penological purpose for such searches. The Ninth Circuit affirmed the clearly established law ruling, but "left open the question of the defendants' reasonable belief." *Id.* at 593. Later, the defendants sought, and the district court refused, a pretrial reasonableness ruling in the Wetmore case. The matter went to trial. When the Wetmore jury found no legitimate penological purpose, the district court treated the finding as collateral estoppel in the subsequent trials of seven more WSP cases. Having consolidated the post-trial appeals, the Ninth Circuit was compelled to reverse all eight judgments on the ground that the second immunity question, defendants' reasonable belief, was a legal question which could and should have been decided in their favor before trial.

substitute employment. Although the order consists merely of a bare denial, the court must have found that settled Ninth Circuit law afforded clear constitutional protection in 1986 to individuals whose employment in the regulated savings and loan industry was expressly contingent on approval of the regulatory authorities. That conclusion conflicts with the Ninth Circuit's observation that the question remained undecided even in 1992. Pet. App. 21a. The erroneous ruling has never been reviewed. Nor has there been review of the district court's finding, also implicit in the order, that no Bank Board supervisory agent could reasonably have believed it was legal to defer approving, as managing officer of a federally insured thrift, a person who was under regulatory investigation for breach of duty at another thrift.

Moreover, the issue the appellate court did decide on Behrens' prior appeal was simply whether the "vague assumptions" that constituted Pelletier's second set of *Bivens* claims, predicated on his inability to find other employment in the industry, pleaded a violation of clearly established law. Pet. App. 21a-23a & n.12. The post-discovery record now supports a determination that Behrens' conduct was not an objectively unreasonable violation of settled law even if Pelletier became unemployable as a result. *See Anderson v. Creighton*, 483 U.S. at 639, 646 n.6.

Behrens' second qualified immunity appeal can be resolved on the record without weighing the sufficiency of respondent Pelletier's evidence or choosing between disputed versions of the historical facts. *See Johnson v. Jones*, 115 S.Ct. at 2156, 2159. The appeal presents precisely the issues of law considered in *Mitchell v. Forsyth*

and included by the Court in the category of appealable orders described there. The Ninth Circuit purports to narrow the *Mitchell* category not on the basis of any diminution in the dignity of the immunity right inherent in second appeals, nor on any unsuitability of second-appeal issues for appellate resolution, but solely and simply for convenience. Behrens respectfully submits that the court of appeals may not so truncate immunity protection.

IV. CONGRESS HAS COMMITTED EXCLUSIVELY TO THIS COURT THE POWER TO MAKE JUDICIAL RULES WHICH "DEFINE OR REFINE" INTERLOCUTORY APPEALABILITY

In March 1995, the Court held in *Swint v. Chambers County*, 115 S.Ct. 1203, that the courts of appeals may not bend and shape their interlocutory-appeal jurisdiction merely to achieve maximum efficiency. The Eleventh Circuit in *Swint* had cited efficiency and economy considerations as grounds for hearing an appeal from an admittedly nonfinal order which the court of appeals chose to treat as pendent to a properly appealable qualified immunity order. The Court disapproved the exercise in part because it undermined both the collateral order doctrine and the statutory certification procedure provided in § 1292(b). In addition, the court of appeals' economy-based approach to interlocutory appeal jurisdiction trespassed upon the recent statutory grant of authority to the Supreme Court to "prescribe rules 'defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291.' " *Swint*, 115 S.Ct. at 1210, citing 28 U.S.C. § 2072(c). The Court stated:

> Congress has thus empowered this Court to clarify when a decision qualifies as "final" for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis. The procedure Congress ordered for such changes, however, *is not expansion by court decision, but by rulemaking* under [28 U.S.C.] § 2072. . . . Congress' designation of *the rulemaking process as the way to define or refine when a district court ruling is "final" and when an interlocutory order is appealable* warrants the Judiciary's full respect.

115 S.Ct. at 1211 (emphasis added).

As *Swint* stressed, the power to create and adjust interlocutory appeal categories lies with this Court, not the courts of appeals, and is circumscribed by the notice and comment procedures provided for in § 2072. The Ninth Circuit has no more power to "refine" immunity orders described in *Mitchell* out of the appealable-order category on judicial economy principles than the Eleventh Circuit had to "define" pendent-party claims into that category on the same rationale.

Even apart from Congress's commitment of finality rules to this Court, the courts of appeals lack authority to impose any procedural rule which, like the Ninth Circuit's one-appeal limitation, is explicitly jurisdictional in purpose or effect. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 146 (1985) (rule permitting dismissal of appeal for failure to object to magistrate's recommendations is properly nonjurisdictional as articulated and applied); *cf. Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (federal courts' rules may not extend or restrict statutory jurisdiction); *see*

also Siegert v. Gilley, 500 U.S. at 236 (Kennedy, J., concurring) (the "substantive defense of qualified immunity controls" in a conflict with procedural rules).

As a solution to a perceived problem, the Ninth Circuit's one-appeal rule is a shotgun fired in the dark. The reversal data discussed here, if it is generally descriptive, indicates that the federal appellate courts are not being inundated with frivolous qualified immunity appeals. On the contrary, most pretrial immunity appeals are meritorious. For genuine instances of abuse, the courts of appeals have at least two readily available deterrents: use of the sanctions authorized by Rule 38 of the Federal Rules of Appellate Procedure; and the summary affirmance procedure adopted by circuit rule in most courts of appeals.[12]

To the extent that refinement of the pretrial immunity appeals process would benefit both the parties and the courts, the rulemaking procedure described in *Swint v. Chambers County Commission* is the appropriate route. In that vein, a legal treatise which generally endorses a single-appeal concept also cautions that any such limitation would have to "entail some complications" to be just and workable. 15A C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* (1992) § 3914.10.

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[12] *E.g.*, Circuit Rule 34-4, United States Court of Appeals for the Ninth Circuit; *see also* 15 C.Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* (1977) § 3993, p. 487. As the Court observed in *Ortega-Rodriguez v. United States*, 113 S.Ct. 1199, 1207 (1993), the "blunderbuss of dismissal" is at best an awkward and imprecise method of controlling abuse of the appellate system.

pp. 676-77. The commentators propose, for instance, that if the court of appeals concludes the record is not sufficiently developed for a decision on the immunity defense at the pleading stage, it should remand for limited factual augmentation rather than issuing a ruling that exhausts the appeal right without resolving the immunity issue. *Id.* A similar procedure would have been appropriate on Behrens' first appeal, where the Ninth Circuit unexpectedly revived dismissed *Bivens* claims with an aside indicating their vulnerability to summary judgment, but left Behrens no recourse if the district court chose, as it did, to ignore that guidance.

A rules committee with the advantages of bench-bar consultations and access to empirical data can identify recurring problems in the immunity appeal process, and can develop uniform, workable procedural solutions, much more effectively than a dozen appellate panels devising ad hoc approaches. Moreover, rules can provide the combination of specificity and flexibility that is difficult to achieve through decisional law, but essential to effect the best practicable accommodation between final judgment principles and qualified immunity policy.

As in *Swint*, the Court need not decide now the precise parameters of the *Mitchell* pretrial appeal right. It need only decide that the Ninth Circuit's inflexible jurisdictional bar against second qualified immunity appeals is inconsistent with existing collateral order decisions of this Court, and impermissibly abridges the qualified immunity defense in the circumstances of this case.

CONCLUSION

The order of the Court of Appeals for the Ninth Circuit dismissing petitioner Behrens' second pretrial qualified immunity appeal for lack of jurisdiction should be vacated and the case remanded to the court of appeals for a hearing on the merits of the appeal.

Respectfully submitted,

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July, 1995

APPENDIX

Judicial Business of the United States Courts, Report of the Director (1994)

Table B-5
U.S. Courts of Appeals Cases Terminated On The Merits, by Circuit During the Twelve Month Period Ended September 30, 1994*

		TERMINATIONS ON THE MERITS							
Circuit & Nature of Proceedings	Total[1] Appeals Terminated	Percent of Total Terminations	Total	Affirmed/ Enforced	Dismissed	Reversed	Remanded	Other	[2] Percent Reversed
ALL CIRCUITS	49,184	55.3	27,219	21,896	1,588	2,790	551	394	10.4
CRIMINAL	11,708	67.7	7,932	6,761	286	620	146	119	7.8
U.S. PRISONER PETITIONS	2,882	63.4	1,826	1,541	177	71	24	13	3.9
OTHER U.S. CIVIL	4,817	56.5	2,724	2,107	112	384	75	46	14.1
PRIV. PRISONER PETITIONS	10,086	47.7	4,808	3,812	483	393	49	71	8.2
OTHER PRIVATE CIVIL	14,287	49.6	7,088	5,521	311	1,046	117	93	14.8
BANKRUPTCY	1,337	48.4	647	509	32	95	6	5	14.7
ADMINISTRATIVE APPEALS	3,469	48.0	1,666	1,171	158	156	134	47	9.4
ORIGINAL PROCEEDINGS	598	88.3	528	474	29	25	-	-	-

* Circuit by circuit tables omitted.

[1] Totals include reopened, remanded, and reinstated appeals as well as original appeals.

[2] Percent not shown where the total number of cases terminated on the merits is less than 10. No percentages of cases reversed or denied have been computed for original proceedings because of their difference from appeals, nor have they been included in the percentage of total appeals reversed.